

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.**

FILED BY CLERK

OCT 28 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

DIANA B.,

Appellant,

v.

ARIZONA DEPARTMENT OF
ECONOMIC SECURITY and
MATTHEW B.,

Appellees.

2 CA-JV 2008-0075

DEPARTMENT B

MEMORANDUM DECISION

Not for Publication

Rule 28, Rules of Civil

Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. JD 2007-00002

Honorable Joseph R. Georgini, Judge

AFFIRMED

Hernandez, Scherb & Hanawalt, P.C.

By Richard Scherb

Florence
Attorneys for Appellant

Terry Goddard, Arizona Attorney General

By Claudia Acosta Collings

Tucson
Attorneys for Appellee Arizona
Department of Economic Security

Law Office of DeLana Jacobs Fuller

By DeLana Jacobs Fuller

Casa Grande
Attorney for Appellee Matthew B.

V Á S Q U E Z, Judge.

¶1 Diana B. challenges the juvenile court's order terminating her parental rights to her son, Matthew B., after she failed to appear for a pretrial conference on the Arizona Department of Economic Security's (ADES) motion to terminate her parental rights. We will not disturb a juvenile court's order terminating a parent's rights unless the order is clearly erroneous. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002). We view the evidence in the light most favorable to upholding the factual findings upon which the order is based. *See Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶ 20, 995 P.2d 682, 686 (2000). We affirm the termination order in this case.

¶2 ADES took custody of Matthew in December 2006, after receiving reports that Diana was neglecting him and using illegal drugs on a daily basis. Subsequently, it filed a dependency petition alleging she had tested positive for methamphetamine. Diana did not appear for the initial dependency hearing, and the juvenile court adjudicated Matthew dependent.

¶3 In April 2008, ADES filed a motion to terminate Diana's parental rights on the grounds of chronic substance abuse pursuant to A.R.S. § 8-533(B)(3) and length of time in care pursuant to A.R.S. § 8-533(B)(8)(b). It also alleged termination was in Matthew's best interests. Diana appeared at the initial termination hearing and signed a notice advising her of her legal rights and admonishing her that she was "required to appear for all termination hearings." In accordance with Rule 64(C), Ariz. R. P. Juv. Ct., the notice also stated:

If you fail to appear without good cause for Termination Pre-trial Conference, Termination Settlement Conference or Termination Adjudication, the court may determine that you have waived your legal rights including the right to a trial by

jury, that you have admitted the grounds alleged in the motion/petition for termination and may terminate your parental rights to your child based on the record and evidence presented.

¶4 Diana failed to appear at a pretrial conference for the termination hearing. Her counsel told the court he could not “account for her non-appearance.” The juvenile court found no “good cause” for her failure to appear and proceeded with the termination adjudication hearing over counsel’s objection. *See Manuel M. v. Ariz. Dep’t of Econ. Sec.*, 218 Ariz. 205, n.5, 181 P.3d 1126, 1130 n.5 (App. 2008) (approving procedure of proceeding with severance hearing at pretrial conference upon parent’s failure to appear without good cause); *Adrian E. v. Ariz. Dep’t of Econ. Sec.*, 215 Ariz. 96, ¶¶ 8-9, 12, 158 P.3d 225, 228-29 (App. 2007) (same). Following ADES’s presentation of testimonial and documentary evidence, the court granted the motion for termination. It later signed a judgment terminating Diana’s parental rights, finding ADES had proven both alleged grounds for termination and that termination was in Matthew’s best interests.

¶5 On appeal, Diana does not contest the sufficiency of the evidence supporting the juvenile court’s order on either of the grounds for termination or on the issue of Matthew’s best interests. She contends only that the court abused its discretion by terminating her parental rights in her absence and suggests that her constitutional rights to procedural due process were thereby violated. However, she concedes she was properly served with notice of the hearing, that she had actual notice of the hearing, and that she had been adequately warned of the consequences of failing to appear. And she does not argue that she failed to appear for “good cause.”

¶6 We find no violation of due process or abuse of discretion in the juvenile court's proceeding in her absence. Enacted by the supreme court in order to give effect to A.R.S. § 8-863(C), Rule 66(D)(2), Ariz. R. P. Juv. Ct., provides as follows:

If the court finds the parent . . . failed to appear at the termination adjudication hearing without good cause shown, had notice of the hearing, was properly served pursuant to Rule 64 and had been previously admonished regarding the consequences of failure to appear, including a warning that the hearing could go forward in the absence of the parent . . . and that failure to appear may constitute a waiver of rights, . . . and an admission to the allegation[s] contained in the motion or petition for termination, the court may terminate parental rights based upon the record and evidence presented if the moving party or petitioner has proven grounds upon which to terminate parental rights.

See Manuel M., 218 Ariz. 205, ¶ 14, 181 P.3d at 1130. Arizona courts have repeatedly approved the use of this procedure in termination proceedings. *See, e.g., id.* ¶¶ 13-15; *Christy A. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 299, ¶¶ 12-19, 173 P.3d 463, 467-69 (App. 2007). The juvenile court did not abuse its discretion by applying it here.

¶7 Furthermore, as Diana acknowledges, “[t]he essence of due process is reasonable notice and an opportunity to be heard.” *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), *quoting Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951) (“The essence of due process is the requirement that ‘a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it.’”). The Supreme Court has explained that due process requires “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Cent. Hanover Bank & Trust Co.*,

339 U.S. 306, 314 (1950); *see also In re Maricopa County Juv. Action No. JS-501904*, 180 Ariz. 348, 355, 884 P.2d 234, 241 (App. 1994). That is exactly what Diana received in this case. She admitted she had notice of the hearing and had been aware of the consequences of her failure to appear. Diana’s choice not to exercise her due process rights does not establish a deprivation of those rights.

¶8 Likewise, Diana’s contention that she “was not afforded her opportunity to confront, contest and challenge the evidence against her at the termination proceedings,” because they were conducted outside her presence, is without merit. Diana was given that opportunity through the notice she received. Moreover, we note that Diana had the right to challenge the evidence ADES presented even in her absence through objections and cross-examination by counsel. *See Manuel M.*, 218 Ariz. 205, ¶ 23, 181 P.3d at 1133.

¶9 The juvenile court’s order terminating Diana’s parental rights to Matthew is affirmed.

GARYE L. VÁSQUEZ, Judge

CONCURRING:

PHILIP G. ESPINOSA, Judge

J. WILLIAM BRAMMER, JR., Judge